UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAMON CANELAS,
HILARIO CHANEZ SANCHEZ,
ANDRES ENCISO,
ELISANDRO LOPEZ,
LAZARO CHANES SANCHEZ,
ADELSO LOPEZ,
DAVID GABRIEL,
LEON PEREZ,
DARWIN VILDOSO ARAPA,
and FERNANDO ARELLANO,
on behalf of themselves, FLSA Collective Plaintiffs, and the Class,

Plaintiffs,

- against -

WORLD PIZZA, INC. d/b/a PIZZA 2000
and GIOVANNI DILUNA, a/k/a JOHN DILUNA,

Defendants.

OPINION AND ORDER

14 Civ. 7748 (ER)

Ramos, D.J.:

Ramon Canelas, Hilario Chanez Sanchez, Andres Enciso, Elisandro Lopez, Lazaro Chanez Sanchez, Adelso Lopez, David Gabriel, Leon Perez, Darwin Vildoso Arapa, and Fernando Arellano (collectively, "Plaintiffs") bring this action under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") against World Pizza, Inc. d/b/a Pizza 2000 ("World Pizza") and Giovanni DiLuna, a/k/a John DiLuna ("John DiLuna," and together with World Pizza, "Defendants") to recover wages allegedly due to them. Before the Court are Plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23 and Plaintiffs' motion for partial summary judgment under Federal Rule of Civil Procedure 56. For the following reasons, Plaintiffs' motion for class certification is GRANTED and Plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part.

I. BACKGROUND[1]

A. The Parties

John DiLuna is the sole owner and president of World Pizza, a New York corporation. Pls.' 56.1 Stmt. ¶¶ 1–2.[2] Through his corporation, DiLuna owns and operates Pizza 2000, a restaurant in Harrison, New York. *Id.* ¶ 3. At all times relevant to this action, DiLuna had the power to hire and fire restaurant employees, the authority to decide their compensation and give pay raises, and the authority to determine their work schedules. *Id.* ¶¶ 4–6.

Plaintiffs are all former non-exempt Pizza 2000 employees who were employed at various times between 2008 and 2015. *Id.* ¶¶ 8, 9, 11, 14, 16, 18, 20, 22, 23, 26. Ramon Canelas worked as a pizza maker from October to November 2013. *Id.* ¶ 8. Hilario Chanez Sanchez worked as a pizza maker from January 2008 to June 2013. *Id.* ¶ 9. Andres Enciso worked as a delivery person from May 2010 to March 2015. *Id.* ¶ 11. Elisandro Lopez worked as a dishwasher and salad preparer from April 2013 to April 2015. *Id.* ¶ 14. Lazaro Chanes Sanchez worked as a pizza maker from approximately September 2011 to March 2015. *Id.* ¶ 16. Adelso Lopez worked as a dishwasher, pizza maker, and food preparer from January 2012 to April 2015. *Id.* ¶ 18. David Gabriel worked as a dishwasher and food preparer from March 2014 to April 2015. *Id.* ¶ 20. Leon Perez worked as a pizza maker from approximately January to August

[1] The following facts are undisputed except where otherwise noted.

[2] Defendants did not submit "correspondingly numbered paragraph[s] responding to each numbered paragraph" in Plaintiffs' Local Civil Rule 56.1 statement, as required by Local Civil Rule 56.1(b). *See* Defs.' 56.1 Resp. Accordingly, each numbered paragraph in Plaintiffs' statement is "deemed to be admitted" for purposes of their motion for summary judgment. Local Civil Rule 56.1(c); *see also Millus v. D'Angelo*, 224 F.3d 137, 138 (2d Cir. 2000) (affirming grant of summary judgment on the basis of uncontested assertions in the moving party's statement).

2014 and from approximately January to February 2015. *Id.* ¶ 22. Darwin Vildoso Arapa worked as a busboy from May 2010 to July 2011 and as a delivery person from approximately February 2014 to April 2015. *Id.* ¶ 23. Fernando Arellano worked as a pizza maker from September 2014 to July 2015. *Id.* ¶ 26.

B. Defendants' Wage and Hour Policies

Defendants did not maintain time records of hours worked by Plaintiffs or other non-exempt employees prior to August 2014. *Id.* ¶ 31. And the time records Defendants produced from August to December 2014 largely omit employees' exact hours. Instead, they show hours in half-hour increments, in accordance with Defendants' policy, until late January 2015, of paying employees for their rounded hours. *Id.* ¶ 34.[3] Despite these evidentiary gaps, it is undisputed that Plaintiffs and their fellow non-exempt employees regularly worked over 10 hours per day and over 40 hours per week. *Id.* ¶¶ 10, 13, 15, 17, 19, 21, 25, 27, 28, 35.[4]

Defendants also did not maintain payroll records for the vast majority of their employees who worked before December 2014. *Id.* ¶ 32.[5] Those payroll records Defendants did maintain for some employees show wage payments only for the first 40 hours worked per week; the records do not show any payment for overtime hours. *Id.* ¶ 33.[6] It is undisputed, however, that until the end of 2014, Defendants paid employees at their regular hourly rates for all of their hours worked, including overtime hours. *Id.* ¶¶ 29–30. Not until January 2015 did Defendants begin paying overtime hours at a rate of time and a half. *Id.* ¶ 30.[7] Moreover, it is undisputed that until the end of 2014, Defendants did not pay employees any spread of hours compensation, *i.e.*, an extra hour of pay at the minimum hourly rate given to an employee when he or she works over 10 hours in one day. *Id.* ¶ 36.[8]

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[3] *See also* Pls.' Summ. J. Mem., Ex. B (Fiona DiLuna Dep.) at 30:22–31:4 ("A. The system I have now – it calculates it to the minute. . . . Q. But before you didn't. Before you rounded it to the nearest hour. Is that right? A. No, half-hour."), Exs. E–F (time records from August to December 2014), Ex. H (payroll records from January to November 2015).

[4] *See also* Pls.' Summ. J. Mem., Exs. D–F, I–L (time records).

[5] *Compare* Pls.' Summ. J. Mem., Exs. E–F (time records from August to December 2014), *with id.*, Ex. G (payroll records from August 2011 to December 2014); *see also id.*, Ex. A. (John DiLuna Dep.) at 141:13–17 ("Q. . . . Do you have any payroll records before January 2015? Because everything in here is only from January 2015 onwards. A. I don't – I don't have anything.").

[6] *See also* Pls.' Summ. J. Mem., Ex. G (payroll records from August 2011 to December 2014).

Defendants paid their tipped employees below the minimum wage: all delivery persons were paid at a regular hourly rate of $6.00, and all waiters, busboys, and runners were paid at a regular hourly rate of $7.00 in 2014 and $8.00 in 2015. *Id.* ¶¶ 40–43.[9] Defendants never provided their tipped employees with notice that they were claiming a tip credit as part of the minimum wage, they did not provide wage statements showing the tip credit claimed for each pay period, and they did not maintain payroll records showing for each employee the amount of tip credit claimed. *Id.* ¶¶ 44–46. Defendants also did not reimburse delivery persons, who used their own cars for deliveries, for their gas and maintenance costs. *Id.* ¶ 47.[10]

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[7] *See also* Pls.' Summ. J. Mem., Ex. A (John DiLuna Dep.) at 29:4–8 ("Q. Some you paid overtime, but then some you did not? A. Well, I paid the – I did not pay the time and a half. I paid the time, the regular time."), 30:5–7 ("Q. Okay. And you did that for all your employees, right? A. Yes."), Ex. G (payroll records from August 2011 to December 2014), Ex. H (payroll records from January to November 2015).

[8] *See also* Pls.' Summ. J. Mem., Ex. A (John DiLuna Dep.) at 105:5–13 ("Q. When did you start paying spread of hours? A. About two years. . . . Q. In 2014? A. . . . Yes."), Ex. G (payroll records from August 2011 to December 2014), Ex. H (payroll records from January to November 2015).

[9] *See also* Pls.' Summ. J. Mem., Ex. A (John DiLuna Dep.) at 67:6–9 ("A. All drivers are $6 an hour, yes. Q. And it's been that way for, like, the last six years, right? A. Yes."), 101:6–24 ("Q. What are their [*sic*] hourly rates for the drivers? A. Six. Q. Okay. For everyone else, it's higher, right – A. Yes. Q. – than $6? Okay. And then for the bussers, what do you pay them? A. Seven, a little bit more. Depends, 7.50. Q. Seven or 7.5? A. Yes. They get up to $8 after a while. Q. Okay. And then how about your servers and runners? A. Same thing, they work on tips. Q. About 7? A. Yeah, 7 to 8."), Ex. N (payroll records from January to April 2015 for delivery persons Andres Enciso and Darwin Vildoso Arapa).

[10] *See also* Pls.' Summ. J. Mem., Ex. A (John DiLuna Dep.) at 105:16–106:4 ("Q. In regards to your drivers, . . . do they drive their own cars? A. Yes. Q. Okay. You don't pay for the cars, right? A. No. Q. You don't pay for the gas, right? A. No. Q. You don't pay for the maintenance, right? A. No.").

Finally, Defendants never provided employees with wages notices, either at the time of hiring or when changes were made to their pay. *Id.* ¶ 37.[11] Defendants also did not provide employees with proper wage statements until the end of December 2014. *Id.* ¶ 39.

C. This Action

On September 24, 2014, Ramon Canelas brought this action against Defendants, alleging a host of FLSA and NYLL violations. Compl. ¶¶ 33–50. Canelas brought his FLSA claims on behalf of himself and all non-exempt persons employed by Defendants during the three years preceding the filing of the Complaint, and his NYLL claims on behalf of himself and all non-exempt persons employed by Defendants during the six years preceding the filing of the Complaint. *Id.* ¶¶ 12, 15.

On November 3, 2014, counsel for Canelas submitted a letter to the Court, requesting that this action be consolidated with a separate action brought against the same Defendants by four other former employees: Refugio Ruiz, Thomas Ruiz, Javier Ponce Aguillar, and Omar Castillo (the "Ruiz plaintiffs"). Doc. 11. One month later, counsel for Canelas notified the Court that only they would seek to be appointed as collective and class action counsel; counsel for the Ruiz plaintiffs would instead proceed to represent only their clients' individual claims. Doc. 14.[12]

On February 20, 2015, the parties stipulated to conditionally certify a FLSA collective of all non-exempt persons employed by Defendants since September 24, 2011. Doc. 35. Notice was sent to all such persons, and between April 6, 2015 and June 15, 2015, eleven individuals joined this suit. Docs. 36–43, 51–53. On December 7, 2015, Plaintiffs filed an Amended Complaint, claiming that:

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[11] *See also* Pls.' Summ. J. Mem., Ex. A (John DiLuna Dep.) at 52:22–53:12 ("Q. Well, did you ever give any employee any notice that they were – what their pay rate was? A. It's on the stub. Q. Well, again, before receiving any stubs, when a person comes to work for you, do you give them anything in writing that tells them what their pay rates are? A. The only thing in writing is the stub. At the end of the week, they see – you know, if they don't understand – Q. You're talking about a pay stub, right? A. Yes. It shows the hourly rate of the minimum page [*sic*]."), 110:3–17 (testifying that an employee received on his first day only two things: one form related to taxes and another to verify identification).

[12] On May 4, 2016, the Court approved a settlement between Defendants and the Ruiz plaintiffs as to their individual claims. *See Ruiz v. World Pizza, Inc.*, No. 14 Civ. 4153 (ER) (S.D.N.Y. May 4, 2016).

- Defendants' policy of paying all of their hours at their regular rates violated FLSA and NYLL requirements that hours worked over 40 per week be paid at a rate not less than time and a half, Am. Compl. ¶¶ 53, 63;

- Defendants' policy of rounding their hours denied them wages for all of their hours worked in violation of both the FLSA and NYLL, *id.* ¶¶ 53, 63;

- Defendants' failure to pay spread of hours compensation violated the NYLL, *id.* ¶ 66;

- Defendants' failure to provide them with wage notices violated the NYLL, *id.* ¶ 68;

- Defendants' failure to provide them with proper wage statements violated the NYLL, *id.* ¶ 67;

- Defendants failed to pay tipped employees the minimum wage in violation of the FLSA and NYLL, because Defendants were not entitled to claim any tip credits under either statute, *id.* ¶¶ 54, 64; and

- Defendants failed to pay delivery persons the minimum wage in violation of the FLSA and NYLL, because Defendants failed to reimburse or compensate these employees for the costs of their car maintenance and gas expenses, *id.* ¶¶ 54, 65.

In December 2015, the parties agreed to submit their dispute to mediation. Doc. 81. After those efforts proved unsuccessful, *see* Doc. 85, on March 8, 2016, Plaintiffs simultaneously moved for class certification and for summary judgment as to liability on all of their claims. Docs. 92 & 102. Defendants opposed both motions. Docs. 110 & 111.

Defendants thereafter wrote to the Court, stating that the parties had again agreed to mediate the matter and requesting that the Court defer issuing any decisions on Plaintiffs' motions until the parties had an opportunity to mediate. Doc. 120. Plaintiffs opposed any such stay. Doc. 122. On September 6, 2016, the Court denied Defendants' request. Doc. 123. The Court has not since received any update as to the parties' efforts to resolve this matter through mediation.

II. CLASS CERTIFICATION

Plaintiffs seek to bring their NYLL claims as a class action on behalf of a class and two subclasses, as follows: (1) all non-exempt persons, including pizza makers, waiters, busboys, dishwashers, cooks, delivery persons, and counter persons, who were employed by Defendants on or after September 24, 2008, the date that is six years preceding the filing of the Complaint (the "Class"); (2) members of the Class who were tipped employees, including waiters, delivery persons, and busboys (the "Tipped Subclass"); and (3) members of the Class who were delivery persons (the "Delivery Subclass"). Pls.' Class Cert. Mem. at 2–3.

A. Legal Standard

One or more members of a class are permitted to sue on behalf of the class if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). The four requirements "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Id.* (internal quotation marks omitted).

The putative class must also satisfy at least one of the three requirements listed in Rule 23(b). Here, Plaintiffs seek class certification under Rule 23(b)(3), which requires them to demonstrate, in addition to the prerequisites of Rule 23(a), that "the questions of law or fact common to class members predominate over any questions affecting only individual members," and that a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

A party seeking class certification must affirmatively demonstrate his compliance with Rule 23. *Wal-Mart*, 564 U.S. at 350. In order words, the Rule "does not set forth a mere pleading standard." *Id.* A district court must undertake a "rigorous analysis" in order to determine whether the requirements have been met. *Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432 (2013). In making such determinations, the court "should not assess any aspect of the merits unrelated to a Rule 23 requirement." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 251 (2d Cir. 2011) (quoting *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)). However, the court's analysis will inevitably "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351.

B. Analysis

1. Numerosity

The numerosity requirement is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Although "numerosity is presumed at a level of 40 members," *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), "[d]etermination of practicability depends on all the circumstances surrounding a case, not on mere numbers," *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). Relevant considerations include "judicial economy arising from the avoidance of a multiplicity of actions, . . . financial resources of class members, [and] the ability of claimants to institute individual suits." *Robidoux*, 987 F.2d at 936.

Although much of the information going to the size of the Class is within Defendants' control, seven Plaintiffs submitted sworn declarations identifying, in total, over 40 employees who they claim were subjected to the same wage and hour policies. *See* Docs. 95–101. The

Court finds that Plaintiffs have thus submitted sufficient evidence to reasonably infer that the Class exceeds 40 members, the threshold at which numerosity is presumed.

Aside from numbers, the Court finds that joinder of all Class members is also impracticable in light of their limited resources and language barriers. *See* Docs. 95–101; *see also Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85–86 (S.D.N.Y. 2001) (considering that members of a class "would not be likely to file individual suits" because of "[t]heir lack of adequate financial resources or access to lawyers, their fear of reprisals (especially in relation to the immigrant status of many), the transient nature of their work, and other similar factors"). Plaintiffs have thus satisfied the numerosity requirement.

2. Commonality

Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." *Wal-Mart*, 564 U.S. at 349–50 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). However, "[t]his does not mean merely that they have all suffered a violation of the same provision of law." *Id.* at 350. Their claims must instead "depend on a common contention" that is "of such a nature that it is capable of classwide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* In other words, what matters is not really "the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Here, because all of Plaintiffs' claims derive from the same wage and hour policies, the Court easily finds a number of questions common to the Class, including:

- whether Defendants had a policy of paying non-exempt employees regular hourly rates, rather than overtime rates, for overtime hours worked;

- whether Defendants had a policy of rounding employees' hours, and whether that policy systematically deprived employees wages for hours worked;
- whether Defendants in practice failed to pay spread of hours compensation; and
- whether Defendants in practice failed to provide employees with proper wage notices and statements.

The Court also finds questions common to the Tipped Subclass, including whether Defendants were entitled to claim tip credits against the minimum wage, as well as questions common to the Delivery Subclass, including whether Defendants had a policy of requiring delivery persons to cover their own costs. *See Wal-Mart*, 564 U.S. at 359 ("[F]or purposes of Rule 23(a)(2) even a single common question will do.") (alterations and internal quotation marks omitted).

Because the answers to these questions will drive the resolution of the litigation, the Court finds the commonality requirement is satisfied. *See, e.g.*, *Shahriar*, 659 F.3d at 252 (affirming grant of class certification where the plaintiffs' NYLL claims "all derive[d] from the same compensation policies and tipping practices").

3. Typicality

Typicality requires that the claims of the representative party be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). The requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 936–37.

Here, all Class members' claims arise from the same policies and practices, and the arguments Plaintiffs make in support of Defendants' liability are typical of those that would be made by others in the Class. Thus, the typicality requirement is satisfied.

4. Adequacy of Representation

The requirement that the representative parties must be able to fairly and adequately protect the interests of the class "is designed to ferret out potential conflicts between representatives and other class members." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001), *superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006). However, "not every potential disagreement between a representative and the class members will stand in the way of a class suit." *Id.* Instead, the conflict must be "fundamental." *Id.*

Defendants argue that certain Plaintiffs are in "direct conflict" with members of the Class, pointing to the fact that one was employed for a shorter period of time than most other employees, one worked for some time as a part-time employee, and two began working prior to April 9, 2011, when certain state law requirements took effect. Defs.' Class Cert. Opp'n Mem. at 13–14. None of these facts, however, create a conflict between Plaintiffs and the rest of the Class, much less a fundamental one. In light of the fact that Plaintiffs' alleged injuries are identical in kind to those of the Class, the Court finds that Plaintiffs' and the Class members' interests are aligned. *See Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008) ("The fact that plaintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class."). Plaintiffs thus satisfy the adequacy requirement.

5. Predominance

The predominance inquiry of Rule 23(b)(3) tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997)). This analysis requires courts to "give careful scrutiny to the relation between common and individual questions in a case" and ask "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* If "one or more of the central issues in the action are common to the class and can be said to predominate," the suit may be maintained as a class action under Rule 23(b)(3) "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.*

The principal issue in this case is the legality of Defendants' various wage and hour practices and policies, which are subject to generalized, rather than individual, proof. *See id.* at 1048 (finding that "the experiences of a subset of employees can be probative as to the experiences of all of them" where "each employee worked in the same facility, did similar work, and was paid under the same policy"). The questions that are common to all Class members therefore predominate over those questions of damages individual to each employee. *See, e.g., Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007) ("The issues to be litigated are whether the class members (1) were supposed to be paid the minimum wage as a matter of law and were not, and (2) were supposed to be paid overtime for working more than 40 hours a week and were not. These are about the most perfect questions for class treatment. Some factual variation among the circumstances of the various class members is inevitable and does not defeat the predominance requirement.”). Plaintiffs thus satisfy the predominance requirement.

6. Superiority

Rule 23(b)(3) requires that a class action be superior to other methods of adjudication. In making this determination, the Court may consider, among other things:

> (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). Plaintiffs’ NYLL claims arise out of the same nucleus of operative facts as their FLSA claims, which are going to be adjudicated in this Court in any event. *Jankowski v. Castaldi*, No. 01 Civ. 0164 (SJF) (KAM), 2006 WL 118973, at *4 (E.D.N.Y. Jan. 13, 2006). Moreover, “there is reason to believe that class members may lack familiarity with the legal system, discouraging them from pursuing individual claims.” *Id.* Accordingly, the Court finds that a class action is superior to other available methods for adjudicating this controversy.

7. Ascertainability

Although Rule 23 does not expressly require that a class be definite in order to be certified, “a requirement that there be an identifiable class has been implied by the courts.” *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 336 (S.D.N.Y. 2002). “An identifiable class exists if its members can be ascertained by reference to objective criteria.” *Id.* at 337. “Where any criterion is subjective, . . . the class is not ascertainable.” *Id.* “In application, this means that it must be ‘administratively feasible for a court to determine whether a particular individual is a member of the class [and t]he Court must be able to make this determination without having to answer numerous individualized fact-intensive questions.'" *Jankowski*, 2006 WL 118973, at *5 (quoting *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 181 (S.D.N.Y. 2005)).

Defendants argue that the Class is not sufficiently ascertainable because "class membership cannot be ascertained until it is determined whether the individual at issue suffered an injury." Defs.' Class Cert. Opp'n Mem. at 6. For example, Defendants argue that in order to ascertain who is a Class member, the Court would be forced to conduct mini-trials to resolve whether "Plaintiffs were properly paid spread of hours" and "whether or not the tipped employees were paid below minimum wage." *Id.* at 7. Defendants appear to misunderstand that although members of the Class share common claims, the Class itself is not defined by its members' alleged injuries. Rather, the Class itself is merely comprised of Defendants' non-exempt employees since September 24, 2008, a group that can be easily ascertained by reference to Defendants' own records. The Court thus finds that Plaintiffs have satisfied this implied requirement.

* * *

As Plaintiffs have established compliance with every Rule 23 requirement, their motion for class certification is granted.

C. Appointment of Class Counsel

Once certification is granted, the Court must appoint class counsel. Fed. R. Civ. P. 23(c)(1)(B). The Court must consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Above all else, "[c]lass counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

Counsel at Lee Litigation Group, PLLC are experienced litigators who have served as counsel for numerous class and collective actions and have considerable experience in labor law cases similar to the case at bar. *See* Lee Decl. (Doc. 94) ¶¶ 3–8. Furthermore, counsel has done a significant amount of work identifying and investigating the potential claims in this action, first on behalf of Canelas and later on behalf of the opt-in Plaintiffs. Finally, the Court is confident that counsel will be able to commit the resources necessary to fairly and adequately represent the Class. *See id.* ¶ 9. Accordingly, the Court appoints Lee Litigation Group, PLLC as class counsel.

III. SUMMARY JUDGMENT

Plaintiffs move for summary judgment on the issue of liability as to all of their claims, as well as a determination that they are entitled to liquidated damages, that the three-year statute of limitations under the FLSA is proper, and that Defendants are jointly and severally liable as employers. Pls.' Summ. J. Mem. at 3–24. Defendants do not contest that they are joint employers, but they submit that there are genuine issues of disputed material fact as to each of Plaintiffs' remaining allegations. Defs.' Summ. J. Opp'n Mem. at 2.

A. Legal Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Senno* *v. Elmsford Union Free Sch. Dist.*, 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009)). A fact is "material" if it might affect the outcome of the litigation under the governing law. *Id.* The party moving for summary judgment is responsible for demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Saenger v. Montefiore Med. Ctr.*, 706 F. Supp. 2d 494, 504 (S.D.N.Y. 2010) (quoting *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008)).

In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)). However, in opposing a motion for summary judgment, the non-moving party may not rely on unsupported assertions, conjecture or surmise. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). The non-moving party must do more than show that there is "some metaphysical doubt as to the material facts." *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). To defeat a motion for summary judgment, "the non-moving party must set forth significant, probative evidence on which a reasonable fact-finder could decide in its favor." *Senno*, 812 F. Supp. 2d at 467–68 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986)).

B. Burden of Proof

Ordinarily, to establish liability under the FLSA for unpaid minimum wages or unpaid overtime compensation, the employee bears the burden of proving that he performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946), *superseded by statute on other grounds as stated in Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 519 (2014). However, if his employer's records are inaccurate or inadequate, the employee can satisfy his burden by submitting "sufficient evidence to show the amount and extent of [the uncompensated work] as a matter of just and reasonable inference." *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 362 (2d Cir. 2011) (quoting *Anderson*, 328 U.S. at 687). "[A]n employee's burden in this regard is not high," and the employee may satisfy it "through estimates based on his own recollection." *Id.* Once the employee has met his burden, the burden then shifts to the employer to produce "evidence of the precise amount of work performed" or "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Anderson*, 328 U.S. at 687–88. If the employer fails to do so, "the court may then award damages to the employee, even though the result be only approximate." *Id.* at 688; *see also Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 66–67 (2d Cir. 1997).

A similar standard is applied in deciding claims for unpaid compensation under the NYLL. *See Berrios v. Nicholas Zito Racing Stable, Inc.*, 849 F. Supp. 2d 372, 380 (E.D.N.Y. 2012); *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 332 & n.3 (S.D.N.Y. 2005). Namely, NYLL § 196-a provides that where an employer fails to "keep adequate records or provide statements of wages to employees as required" by the statute, the employer "shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." NYLL § 196-a(a).[13] If an employer cannot satisfy its burden under the FLSA, it cannot satisfy the "more demanding burden" of the NYLL. *Doo Nam Yang*, 427 F. Supp. 2d at 337 n.15; *see also Jiao v. Shi Ya Chen*, No. 03 Civ. 0165 (DF), 2007 WL 4944767, at *3 (S.D.N.Y. Mar. 30, 2007).

C. Analysis

1. Overtime Compensation

Both the FLSA and NYLL require employers to compensate every non-exempt employee for any hours worked in excess of 40 per week at a rate not less than one and one-half times the regular rate at which the employee is employed. 29 U.S.C. § 207(a)(1); 12 N.Y.C.R.R. § 142-2.2.

Defendants argue that a genuine dispute exists as to whether Plaintiffs agreed to a "weekly salary" that was intended to include an overtime premium for hours worked in excess of 40 per week. Defs.' Summ. J. Opp'n Mem. at 4–6. Defendants rely on *Giles v. City of New York*, which explained that although "[t]here is a rebuttable presumption that a weekly salary covers 40 hours; the employer can rebut the presumption by showing an employer-employee agreement that the salary cover[s] a different number of hours" that "include[s] overtime hours at the premium rate." 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999). *Giles* is inapplicable here, however, as there is no evidence in the record that Plaintiffs were paid a weekly salary. Rather, the evidence is overwhelming that Plaintiffs were paid an hourly rate.[14]

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[13] Prior to April 9, 2011, the statute provided only that an employer's failure to "keep adequate records" shifted the burden of proof. *See* 2010 N.Y. Laws ch. 564 § 5 (amending NYLL § 196-a).

[14] Even if Plaintiffs were being paid a weekly salary, Defendants fail to submit any evidence that "the contracting parties intend[ed] and underst[ood] the weekly salary to include overtime hours at the premium rate." *Giles*, 41 F. Supp. 2d at 317. To the contrary, at his deposition, John DiLuna testified that he never told employees they would get paid overtime, never sat down and discussed with them the rate at which they would be paid, and never had any agreement with them as to what the rate would be. Pls.' Summ. J. Mem., Ex. A (John DiLuna Dep.) at 39:3–5, 51:8–52:19.

It is undisputed that Plaintiffs regularly worked over 40 hours per week. It is also undisputed that until the end of 2014, Defendants paid employees at their regular hourly rates for all of their hours worked, including overtime hours. Accordingly, Plaintiffs' motion for summary judgment on their claim for overtime compensation is granted.

2. Rounding of Hours

"Rounding practices are not *per se* unlawful" under the FLSA. *Burns v. Haven Manor Health Care Ctr., LLC*, No. 13 Civ. 5610 (DLI) (CLP), 2015 WL 1034881, at *1 n.2 (E.D.N.Y. Mar. 10, 2015). Federal regulation describes when such a practice is permissible:

> "Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

29 C.F.R. § 785.48(b); *see also* Dep't of Labor, Nov. 7, 1994 Opinion Letter, 1994 WL 1004879, at *1 (opining that "a practice of rounding to the nearest one-half hour . . . would not be inconsistent with the practices outlined in" the federal regulation).[15] Although "no New York statute or regulation addresses the permissibility of rounding policies, New York's Department of Labor generally follows the FLSA and related regulations." *Gordon v. Kaleida Health*, 299 F.R.D. 380, 405 n.25 (W.D.N.Y. 2014).

[15] *See also* Dep't of Labor, Nov. 7, 1994 Opinion Letter, 1994 WL 1004879, at *1 ("It should be noted, however, that where an employer *arbitrarily* fails to pay an employee for any part of the employee's fixed or regular working time, however small, this would be considered a violation of the FLSA.") (emphasis added).

It is undisputed that until late January 2015, Defendants rounded their employees' hours to the nearest half hour each day and then paid wages only for those rounded hours, instead of actual hours worked. Pls.' 56.1 ¶ 34.[16] Plaintiffs argue that this policy resulted, over a period of time, in a failure to compensate them properly for all the time they actually worked, in violation of the FLSA and NYLL. Pls.' Summ. J. Mem. at 6–7; Pls.' Summ. J. Reply Mem. at 5–6. Defendants contend that they employed a "facially neutral time rounding policy" that, "on average, favor[ed] neither overpayment nor underpayment," and thus their practice was not unlawful. Defs.' Summ. J. Opp'n Mem. at 7.[17]

Defendants failed to preserve records of any hours worked by their employees, actual or rounded, prior to August 2014. Pls.' 56.1 ¶ 31. And those records maintained since August 2014 largely contain only rounded, not actual, hours. *See, e.g.*, Pls.' Summ. J. Mem., Exs. E–F. Plaintiffs may therefore satisfy their burden on their FLSA claim by submitting "sufficient evidence to show the amount and extent of [their uncompensated work] as a matter of just and reasonable inference." *Kuebel*, 643 F.3d at 362 (quoting *Anderson*, 328 U.S. at 687). As to Plaintiffs' NYLL claim, Defendants bear the burden of proving that Plaintiffs were paid proper wages. NYLL § 196-a(a).

Plaintiffs argue that Defendants' limited time records show that Defendants' policy resulted in a failure to pay compensation for all hours worked. Pls.' Summ. J. Mem. at 6–7. For example, Plaintiffs point out that Lazaro Chanes Sanchez's hours were rounded down to the nearest half hour almost every day during the time period in which records for both his actual and rounded hours are available. *Id.* at 7. Indeed, Sanchez's hours were rounded down on 17 out of those 24 days. *Id.*, Ex. I. Other employees' records show similar trends. *See id.* (showing that David Gabriel's hours were rounded down on 23 out of 30 days), Exs. E–F. Although Plaintiffs have not calculated the net amount of uncompensated time discernible from these records, the Court finds that Plaintiffs have satisfied their burden of establishing a "just and reasonable inference" that they, over time, were denied wages for time actually worked.[18]

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[16] The parties do not dispute that Defendants rounded hours to the nearest half hour. However, the Court notes that it has identified at least two instances on only the first page of Plaintiffs' time records in which hours were incorrectly rounded down instead of up. *See* Pls.' Summ. J. Mem., Ex. E at 1 (Andres Enciso) (rounding 12 hours and 19 minutes down to 12 hours, and rounding 10 hours and 46 minutes down to 10.5 hours).

[17] Defendants do not argue that there are certain periods of time between the times employees clocked in and out that are not compensable.

Defendants have not come forward with any evidence to negate the reasonableness of this inference, nor have they proved that their practice of rounding hours did not result, over a period of time, in a failure to compensate their employees properly for all the time they actually worked. Accordingly, Plaintiffs' motion for summary judgment on their rounding claim is granted.

3. Spread of Hours Compensation

A "spread of hours" is defined as "the length of the interval between the beginning and end of an employee's workday." 12 N.Y.C.R.R. § 146-1.6. Since January 1, 2011, the NYLL has required that "[o]n each day on which [a restaurant employee's] spread of hours exceeds 10, [the] employee shall receive one additional hour of pay at the basic minimum hourly rate . . . regardless of [the] employee's regular rate of pay." 12 N.Y.C.R.R. § 146-1.6. Before January 1, 2011, the NYLL required the spread of hours premium only for employees who were paid the minimum wage. *See Yuquilema v. Manhattan's Hero Corp.*, No. 13 Civ. 461 (WHP) (JLC), 2014 WL 4207106, at *4 (S.D.N.Y. Aug. 26, 2014), *adopted by* 2014 WL 5039428 (S.D.N.Y. Sept. 30, 2014); *Guan Ming Lin v. Benihana N.Y. Corp.*, No. 10 Civ. 1335 (RA) (JCF), 2012 WL

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[18] By way of example, if an employee actually worked from 10:00 a.m. to 10:10 p.m. each day for five days per week, Defendants' policy would consistently fail to compensate him for 10 minutes worked per day, or a total of 50 minutes worked per week. Such an arrangement of compensation would never "average[] out," and would thus be impermissible under the FLSA and NYLL. 29 C.F.R. § 785.48(b).

7620734, at *2 (S.D.N.Y. Oct. 23, 2012), *adopted by* 2013 WL 829098 (S.D.N.Y. Feb. 27, 2013).

It is undisputed that Plaintiffs regularly worked over 10 hours per day. It is also undisputed that until the end of 2014, Defendants did not pay employees any spread of hours compensation. Accordingly, Plaintiffs' motion for summary judgment on their spread of hours claim is granted.

4. Wage Notices

New York's Wage Theft Prevention Act ("WTPA"), which became effective on April 9, 2011, requires every employer to "provide [its] employees, in writing in English and in the language identified by each employee as the primary language of such employee . . . a notice containing," among other things, "the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; [and] the regular pay day designated by the employer." NYLL § 195(1)(a). For non-exempt employees, the notice must also state "the regular hourly rate and overtime rate of pay." *Id.* Moreover, "[e]ach time the employer provides such notice to an employee," the employer must obtain from the employee "a signed and dated written acknowledgment, in English and in the primary language of the employee, of receipt of [the] notice," which the employer must "preserve and maintain for six years." *Id.*[19]

From April 9, 2011 to February 26, 2015, employers were required to provide the wage notice to each employee "at the time of hiring, and on or before February first of each subsequent

[19] NYLL § 198(1-b) sets forth the remedies available for violations of § 195(1). *See also* 2014 N.Y. Laws ch. 537 § 2 (amending penalty amounts as of February 27, 2015).

year of the employee's employment with the employer." *See* 2010 N.Y. Laws ch. 564 § 3 (amending NYLL § 195(1)(a)); 2014 N.Y. Laws ch. 537 § 1 (same). Thus, in *Inclan v. New York Hospitality Group, Inc.*, the district court held that employees hired before April 9, 2011 could not sustain a claim for failure to receive notice at the time of hiring, but those of them who remained employed after February 1, 2012 could sustain a claim for failure to receive a notice by that date. 95 F. Supp. 3d 490, 501–02 (S.D.N.Y. 2015). Following an amendment taking effect on February 27, 2015, employers were required to provide the notice only "at the time of hiring." 2014 N.Y. Laws ch. 537 § 1.

Because it is undisputed that Defendants did not provide employees with wage notices after April 9, 2011, when the WTPA took effect, Plaintiffs' motion for summary judgment on their wage notice claim is granted.

5. Wage Statements

The WTPA requires every employer to "furnish each employee with a statement with every payment of wages, listing the following: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages." NYLL § 195(3). For non-exempt employees, the statement must also include "the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked." *Id.*[20]

[20] NYLL § 198(1-d) sets forth the remedies available for violations of § 195(3). *See also* 2014 N.Y. Laws ch. 537 § 2 (amending penalty amounts as of February 27, 2015).

Because it is undisputed that Defendants did not provide employees with proper wage statements from April 9, 2011, when the WTPA took effect, through the end of December 2014, Plaintiffs' motion for summary judgment on their wage statement claim is granted.

6. Tip Credits

Under the FLSA, an employer is permitted to pay tipped employees at an hourly rate below the minimum wage if the employee's wages and tips, added together, meet or exceed the minimum wage. 29 U.S.C. § 203(m). To be eligible to claim this tip credit, however, the employer must first have informed the tipped employee of this provision of the FLSA. *Id.* "This notice provision is strictly construed and normally requires that an employer take affirmative steps to inform affected employees of the employer's intent to claim the tip credit. *Inclan*, 95 F. Supp. 3d at 497.

Prior to January 1, 2011, the NYLL required an employer seeking to apply a tip credit to "furnish each employee with a statement with every payment of wages" listing, among other things, "the credit claimed against the minimum wage." *Romero v. Anjdev Enters., Inc.*, No. 14 Civ. 457 (AT), 2017 WL 548216, at *9 (S.D.N.Y. Feb. 10, 2017) (citing 12 N.Y.C.R.R. § 137-2.2 (repealed 2011)). The employer was also required to maintain and preserve for not less than six years weekly payroll records showing, for each employee, the tip credits claimed. *Id.* (citing 12 N.Y.C.R.R. § 137-2.1 (repealed 2011)); *see also Mendez v. Pizza on Stone, LLC*, No. 11 Civ. 6316 (DLC), 2012 WL 3133547, at *4 (S.D.N.Y. Aug. 1, 2012). Although Defendants maintain that nothing in the NYLL required them to comply with these provisions in order to claim tip credits, courts in this district have held otherwise. *See, e.g.*, *Romero*, 2017 WL 548216, at *9 ("Failure to comply with these requirements would result in liability for [failing to pay] the minimum wage."); *Cao v. Wu Liang Ye Lexington Rest., Inc.*, No. 08 Civ. 3725 (DC), 2010 WL 4159391, at *2 (S.D.N.Y. Sept. 30, 2010) ("An employer may receive the benefit of this tip credit only if the employer provides to each employee a statement with every payment of wages . . . and maintains and preserves . . . payroll records" as required by 12 N.Y.C.R.R. §§ 137-2.1 and 2.2) (alterations and internal quotation marks omitted).

Since January 1, 2011, the NYLL has required that "[p]rior to the start of employment," and "prior to any change in the employee's hourly rates of pay," an employer must give each employee written notice, in English and any other language spoken by the employee as his or her primary language, of the amount of tip credit to be taken from the basic minimum hourly rate. 12 N.Y.C.R.R. § 146-2.2. The employer must keep the employee's signed acknowledgment of receipt of the notice on file for six years. *Id.* An employer is only permitted to apply a tip credit towards the minimum wage if it complies with these provisions. 12 N.Y.C.R.R. § 146-1.3.

It is undisputed that Defendants failed to provide their tipped employees with notice that they were claiming a tip credit as part of the minimum wage or wage statements showing the tip credit claimed for each pay period. Pls.' 56.1 ¶¶ 44–45. It is also undisputed that Defendants did not maintain payroll records showing for each employee the amount of tip credit claimed. *Id.* ¶ 46. Accordingly, Defendants were not entitled to claim any tip credits under either the FLSA or the NYLL, and Plaintiffs' motion for summary judgment on their tip credit claim is granted.

7. Costs of Tools of the Trade

Vehicles are considered "tools of the trade" if "employees are required to possess and utilize them in the course of their employment." *Guan Ming Lin v. Benihana Nat'l Corp.*, 755 F. Supp. 2d 504, 511 (S.D.N.Y. 2010). The FLSA and NYLL allow employers to "require employees to bear the costs of acquiring and maintaining tools of the trade so long as those costs, when deducted from the employees' weekly wages, do not reduce their wage to below the required minimum." *Id.* at 511–12; *see also* 29 C.F.R. § 531.35; 12 N.Y.C.R.R. § 146-2.7(c); 12 N.Y.C.R.R. § 137-2.5(b) (repealed 2011).

It is undisputed that delivery persons employed by Defendants were required to use their own cars for deliveries, and that Defendants did not reimburse them for their gas and maintenance costs. Pls.' 56.1 ¶ 47. Defendants instead argue that delivery persons, as tipped employees, were paid above the minimum wage, and that Plaintiffs have failed to establish that in any given week their costs were so substantial as to cut into their minimum wage. Defs.' Summ. J. Opp'n Mem. at 15–16. However, Defendants' tipped employees were improperly paid below the minimum wage. *See supra* Section III.C.6. Any gas or maintenance costs would therefore necessarily cut into a delivery person's minimum wage. Plaintiff's motion for summary judgment on their costs of tools of the trade claim is thus granted.

8. Liquidated Damages

i. Good Faith and Reasonableness

Under the FLSA, a district court is generally required to award a prevailing plaintiff liquidated damages equal in amount to actual damages. *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 150 (2d Cir. 2008) (citing 29 U.S.C. § 216(b)). However, the district court has discretion to deny or limit liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. "The employer bears the burden of proving good faith and reasonableness, [and] the burden is a difficult one, with double damages being the norm and single damages the exception." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999). "'Good faith' in this context requires more than ignorance of the prevailing law or uncertainty about its development." *Reich v. S. New Eng. Telecomms.*, 121 F.3d at 71. It requires that an employer first "take active steps to ascertain the dictates of the FLSA and then act to comply with them." *RSR*, 172 F.3d at 142.

Similarly, since November 24, 2009, the NYLL has entitled a prevailing plaintiff to liquidated damages "unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law." NYLL §§ 198(1-a), 663(1). Although the text of the NYLL's current liquidated damages provision is not identical to the FLSA's provision, "courts have not substantively distinguished the federal standard from the current state standard of good faith." *Garcia v. JonJon Deli Grocery Corp.*, No. 13 Civ. 8835 (AT), 2015 WL 4940107, at *5 (S.D.N.Y. Aug. 11, 2015) (quoting *Inclan*, 95 F. Supp. 3d at 505).

There is no evidence in the record from which the Court can conclude that Defendants took active steps to understand or comply with either the FLSA or NYLL during the relevant time period. Over a year *after* this action was filed, John DiLuna testified that he still did not know what the statutes were. Pls.' Summ. J. Mem., Ex. A at 134:4–13.[21] Accordingly, Defendants have not established good faith, and Plaintiffs are entitled to liquidated damages on their FLSA claims and their NYLL claims arising since November 24, 2009. *See Kuebel*, 643 F.3d at 366 (applying the version of NYLL's liquidated damages provision in effect at the time the plaintiff was employed by the defendant).

ii. Willfulness

Prior to November 24, 2009, an employee would be entitled to liquidated damages under the NYLL only "upon a finding that the employer's failure to pay the wage required . . . was willful." *See* 2009 N.Y. Laws ch. 372 §§ 1, 3 (amending NYLL §§ 198(1-a), 663(1)). To prove willfulness, it must be established that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Parada v. Banco Indus. de*

[21] DiLuna also testified that he had never retained counsel to help him maintain compliance with wage and hour requirements prior to being sued, and that he did not know what the NYLL requirements were with respect to providing employees with wage notices and statements. Pls.' Summ. J. Mem., Ex. A at 134:14–135:14.

Venezuela, C.A., 753 F.3d 62, 71 (2d Cir. 2014) (quoting *Reich v. Waldbaum, Inc.*, 52 F.3d 35, 39 (2d Cir. 1995)). "[I]f an employer acts unreasonably, but not recklessly, in determining its legal obligation, its action should not be considered willful." *Id.* On the issue of willfulness, the plaintiff bears the burden of proof. *Id.*

"Because of the difficulty in discerning, as a matter of law, whether unlawful conduct is on the one hand negligent or unreasonable, or on the other hand knowing or reckless, "[c]ourts in this Circuit have generally left the question of willfulness to the trier of fact.'" *Inclan*, 95 F. Supp. 3d at 503 (quoting *Ramirez v. Rifkin*, 568 F. Supp. 2d 262, 268 (E.D.N.Y. 2008)). As in *Inclan*, this Court "see[s] no reason in this case to depart from the general reluctance of courts to resolve the question of willfulness on a motion for summary judgment," *id.*, particularly given that there is no evidence in the record that Defendants knowingly violated the law.

Accordingly, a genuine dispute for trial exists as to whether Plaintiffs are entitled to liquidated damages on their NYLL claims arising before November 24, 2009.

8. Statute of Limitations

Generally, the FLSA provides for a two-year statute of limitations on actions to enforce its provisions. 29 U.S.C. § 255(a). However, when the "cause of action aris[es] out of a willful violation," the limitations period is three years after the cause of action accrued. *Id.* The meaning of willfulness under the FLSA's statute of limitations is considered to be the same as willfulness under the NYLL's former liquidated damages provision. *See Inclan*, 95 F. Supp. 3d at 504–05. Accordingly, for the same reasons stated above, a genuine dispute for trial exists as to whether the two- or three-year limitations period applies to Plaintiffs' FLSA claims.[22]

[22] Under the NYLL, the limitations period for violations of the state's minimum wage and overtime requirements is six years. NYLL §§ 198(3), 663(3). Accordingly, Defendants are liable for NYLL violations that accrued during the six years preceding the filing of the Complaint.

10. Joint and Several Liability

To be liable under the FLSA, one must be an "employer," which the statute broadly defines as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The NYLL adopts a similarly broad definition of "employer," and the two definitions are "coextensive." *Jeong Woo Kim v. 511 E. 5th St., LLC*, 133 F. Supp. 3d 654, 665 (S.D.N.Y. 2015); *see* NYLL §§ 2(6), 651(6). When determining whether a person is an "employer," courts are instructed to ground the inquiry in "'economic reality rather than technical concepts,' determined by reference not to 'isolated factors, but rather upon the circumstances of the whole activity.'" *Barfield*, 537 F.3d at 141 (first quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); then quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

Defendants do not dispute that they are joint employers for purposes of the FLSA and NYLL. Moreover, DiLuna undisputedly controlled all key aspects of Plaintiffs' employment, including hiring, firing, rates of pay, and scheduling. *See Irizarry v. Catsimatidis*, 722 F.3d 99, 109 (2d Cir. 2013) ("[T]o be an 'employer,' an individual defendant must possess control over a company's actual 'operations' in a manner that relates to a plaintiff's employment.") Accordingly, Plaintiffs' motion for summary judgment on the issue of joint and several liability is granted.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification is GRANTED. Plaintiffs' motion for summary judgment is DENIED as to (i) their claim for liquidated damages for violations of the NYLL prior to November 24, 2009; and (ii) the limitations period to be applied to their FLSA claims. Plaintiffs' motion for summary judgment is GRANTED in all other respects.

It is hereby ordered that:

(1) Plaintiffs are appointed representatives to sue on behalf of a class of all non-exempt persons employed by Defendants on or after September 24, 2008 for Defendants' alleged violations of the NYLL based on failure to pay proper overtime compensation, failure to pay wages due to improper rounding of hours worked, failure to pay spread of hours premiums, failure to provide proper wage notices, and failure to provide proper wage statements.

(2) Andres Enciso and Darwin Vildoso Arapa are appointed representatives to sue on behalf of a subclass of all tipped employees employed by Defendants on or after September 24, 2008 for Defendants' alleged violations of the NYLL based on failure to pay proper minimum wages due to improper tip credit deductions.

(3) Andres Enciso and Darwin Vildoso Arapa are appointed representatives to sue on behalf of a subclass of all delivery persons employed by Defendants on or after September 24, 2008 for Defendants' alleged violations of the NYLL based on failure to pay proper minimum wages due to failure to reimburse costs of tools of the trade.

(4) Lee Litigation Group, PLLC is appointed class counsel.

(5) By **April 14, 2017**, Plaintiffs shall submit a revised proposed class notice that reflects the Court's decision establishing Defendants' liability for violations of the FLSA and NYLL.

(6) The parties shall appear for a status conference on **April 26, 2017 at 10:00 a.m.**

The Clerk of the Court is respectfully directed to terminate the motions, Docs. 92 & 102.

It is SO ORDERED.

Dated: March 31, 2017
New York, New York

Edgardo Ramos, U.S.D.J.